IN THE

Supreme Court of the United States

October Term, 1976

No. 76-616

THE STATE OF NEW YORK,

Appellant,

—against—

CATHEDRAL ACADEMY,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR APPELLEE

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Opinions Below

The memorandum decision of the Court of Appeals[1] is reported at 39 N.Y.2d 1021, 387 N.Y.S.2d 246, 355 N.E.2d 300. The dissenting opinion in the Appellate Division[2] upon which appellee's claim was ordered reinstated is reported at 47 App.Div.2d 396-400, 366 N.Y.S.2d 905-08 (3d Dep't 1975).

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[1] Appendix A to appellant's Statement as to Jurisdiction [hereinafter referred to as "JS"].

[2] JS Appendix B, pp. A10 to A16. Another dissenting opinion in the Appellate Division, which the Court of Appeals did not adopt, is reported at 47 App.Div.2d 400-02, 366 N.Y.S.2d 909-10 (3d Dep't 1975).

Constitutional Provision and Statute Involved

The First Amendment reads, in pertinent part, as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . .

The statute involved is Chapter 996 of the 1972 Laws of New York, entitled "An Act to confer jurisdiction upon the court of claims to hear, audit and determine the claim or claims of nonprofit schools, other than public schools for expenses incurred in rendering certain mandated services" [3] and discussed below at pages 5-7.

Question Presented

Whether New York may, under *Lemon* v. *Kurtzman*, 411 U.S. 192 (1973), provide for the equitable reimbursement of nonpublic schools for the cost of services rendered in reliance upon a prior statute authorizing ultimate payment by the State and which services were planned and budgeted for and in part rendered before a District Court decision, later affirmed by this Court, that the prior statute was unconstitutional.

Statement of the Case

Chapter 996 was enacted to correct an inequitable situation facing nonpublic schools in New York State which resulted from the coincidental timing of a decision of the United States District Court for the Southern District of New York, invalidating, on First Amendment grounds, the Mandated Services Act.[4] Pursuant to Chapter 996, appellee filed a claim for $7,347.29 against the State of New York for reimbursement of monies budgeted for and expended during the second semester of the 1971-1972 school year in connection with various record-keeping and testing services, payment of which would have been made but for the District Court's intervening decision and injunction.

[3] The full text of the statute [hereinafter referred to as "Chapter 996"] is set forth for the Court's convenience in the appendix to this brief, as well as at pages 58-61 of the Appendix.

The Mandated Services Act

In the Mandated Services Act, the Legislature had declared that the State had the "duty and authority to provide the means to assure, through examination and inspection . . . that all of the young people of the state, regardless of the school in which they [we]re enrolled, [we]re attending upon instruction as required by the education law and [we]re maintaining levels of achievement". [1970] Laws of N.Y. ch. 138, §1. Section 2 provided that, for school years beginning after July 1, 1970, qualifying nonpublic schools such as appellee would be reimbursed on an average daily attendance basis for the expenses incurred in providing various testing and record-keeping services which these schools were required by state law to perform. Section 5 provided that the schools would be reimbursed each year in two installments, half of such expenses to be reimbursed between January 15 and March 15, with the balance to be paid to the schools between April 15 and June 15.

[4] [1970] Laws of N.Y. ch. 138; Appendix, pp. 62-65, held unconstitutional by the District Court on April 27, 1972, which decision was thereafter affirmed by this Court in *Levitt* v. *Committee for Public Education & Religious Liberty*, 413 U.S. 472 (1973).

On June 30, 1970, an action was commenced in the District Court, challenging the Mandated Services Act as violative of the Establishment and Free Exercise Clauses of the First Amendment and seeking a permanent injunction against its enforcement. A number of nonpublic schools, including appellee, were permitted to intervene as defendants. The plaintiffs did not move, however, for a temporary restraining order or preliminary injunction, as the District Court noted on January 28, 1971 in granting their motion to convene a three-judge District Court pursuant to then applicable 28 U.S.C. §§2281, 2284. *See Committee for Public Education & Religious Liberty* v. *Rockefeller,* 322 F.Supp. 678, 681 n.4 (S.D.N.Y. 1971).

A hearing before the three-judge District Court was scheduled for April 8, 1971, but it was not held, and there were no proceedings before the Court until more than a year later. The case was then briefed and argued on April 11, 1972, at which time the Court orally entered a temporary restraining order against the payments which were scheduled to be made on or after April 15th. On April 27, 1972, the Court, by a two-to-one majority, held the Mandated Services Act unconstitutional as contravening the Establishment Clause. *See Committee for Public Education & Religious Liberty* v. *Levitt,* 342 F.Supp. 439 (S.D.N.Y. 1972). Final judgment, enjoining the State from reimbursing the nonpublic schools for expenses incurred during the spring 1972 semester, was entered on June 1, 1972 when the 1971-1972 school year was virtually at an end.

The defendants, including appellee, appealed to this Court, which noted probable jurisdiction on November 6, 1972,[5] heard oral argument on March 19, 1973 and, on June

[5] 409 U.S. 977.

25, 1973, affirmed over a dissent the judgment of the District Court. *Levitt* v. *Committee for Public Education & Religious Liberty,* 413 U.S. 472.

During the approximately 22-month period between commencement of the action and determination by the District Court that the Mandated Services Act was unconstitutional, appellee, as well as other nonpublic schools, had filed claims for reimbursement of the costs of rendering the mandated services for the school year 1970-1971 and received reimbursement therefor in two payments during 1971 pursuant to Section 5 of the Act. In budgeting and otherwise planning for the 1971-1972 school year, appellee relied upon the eventual receipt of reimbursement for the expenses of rendering the mandated services[6] and filed a claim for reimbursement for that year. In January 1972, appellee received from the State $7,347.28 in reimbursement for the first half of the 1971-1972 school year. Appellee expected to receive, and relied upon receiving, a second installment for providing the mandated services during the second half of that school year. However, this payment was never made because of the District Court's oral restraining order of April 11, 1972, decision of April 27th and injunction of June 1, 1972.

Chapter 996

The New York Legislature enacted Chapter 996 for the specific, but limited, purpose of correcting the inequitable situation in which nonpublic schools such as appellee had

[6] Reliance by appellee was specifically found by the Court of Claims. *See infra,* p. 7. The dissenting opinion in the Appellate Division adopted by the Court of Appeals reflects acceptance of this finding. *See generally infra,* pp. 8-10.

been placed due to the timing of the District Court's decision. This statute, which was enacted over a year before this Court's ultimate decision in *Levitt*, was designed to do equity to those nonpublic schools which had relied in budgeting and planning for the 1971-1972 school year upon receiving reimbursement for the total cost of rendering services mandated by the State, but which were prevented from receiving the second half of the reimbursement which, but for the District Court's oral restraining order on April 11, 1972 and decision on April 27, 1972, would have been paid during the period April 15, 1972—June 15, 1972.

Section 1 of Chapter 996 confers jurisdiction on the New York Court of Claims "to hear, audit and determine" claims of nonpublic schools such as appellee

> against the state for reimbursement of the funds expended by them in rendering services for examination and inspection in connection with administration, grading and the compiling and reporting of the results of tests and examinations, maintenance of records of pupil enrollment and reporting thereon, maintenance of health records, recording of personnel qualifications and characteristics and the preparation and submission to the state of various other reports required by law or regulation.

The core of the statute is the recognition that nonpublic schools relied in budgeting for the 1971-1972 school year on receiving reimbursement for all of the expenses incurred during that year in providing the services mandated by the State. Section 2 sets forth the considerations underlying Chapter 996, including the facts that the schools had made personnel available to perform the mandated services,

that they budgeted for and relied upon being reimbursed and that the Legislature recognized "a moral obligation to provide a remedy".

Prior Proceedings

On September 6, 1972, appellee filed its claim in the Court of Claims for $7,347.29 pursuant to Chapter 996. On November 20, 1973, appellee filed a motion for summary judgment,[7] and the State cross-moved to dismiss the claim.

The Court of Claims found as a matter of fact

> that the claimant was one of the schools included within the provisions of Chapter 138 and in accordance therewith made application for reimbursement for services rendered in the school year 1970-1971 and was reimbursed by the State for that school year in two equal payments; *that claimant budgeted for, relied upon and filed a similar application* on or about November 5, 1971 for reimbursement for the school year 1971-1972 and the State reimbursed the claimant in January of 1972 for the first semester; and that the claimant rendered the required services for the remaining semester of the 1971-1972 school year and has not been reimbursed therefor.[8]

Nevertheless, the Court of Claims dismissed appellee's claim on the ground that the Establishment Clause rendered Chapter 996 unconstitutional. *Cathedral Academy* v. *State of New York*, 77 Misc.2d 977, 985, 354 N.Y.S.2d 370, 378-79, (N.Y.Ct.Cl. 1974); Appendix, p. 56.

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[7] *See* Appendix, pp. 2-14.

[8] *Cathedral Academy* v. *State of New York*, 77 Misc.2d 977, 978, 354 N.Y.S.2d 370, 372 (N.Y.Ct.Cl. 1974); Appendix, p. 46 (emphasis added).

Appellee's position was that, as a matter of federal constitutional law under *Lemon* v. *Kurtzman*, 411 U.S. 192 (1973),[9] discussed below at pages 13-24, a state is not prohibited from reimbursing nonpublic schools for expenses incurred in good faith reliance on a statute which at the time of enactment was not clearly unconstitutional, pending the resolution of litigation concerning the constitutionality of the statute. However, the Court of Claims held that, because this Court had declared the Mandated Services Act unconstitutional in *Levitt*, the granting of appellee's claim under Chapter 996 "would have the effect of resurrecting Chapter 138 which the Supreme Court declared unconstitutional". 77 Misc.2d at 983, 354 N.Y.S.2d at 376; Appendix, p. 53.

The Appellate Division, by a 3-2 vote, affirmed the judgment of the Court of Claims. *Cathedral Academy* v. *State of New York*, 47 App.Div.2d 390, 366 N.Y.S.2d 900 (3d Dep't 1975); JS Appendix B. Presiding Justice Herlihy dissented on the ground that this case presented substantially the same situation as in *Lemon II*:

> Pursuant to chapter 996 . . ., there is to be a postaudit to determine whether or not the mandated services had in fact been performed by the claimant. While it is true that in *Lemon II* there had presumably been active supervision of the affairs of the school so as to insure that the acts for which reimbursement was to be made were not at least directly for religious purposes, the postaudit, which in this case is to be performed by the Court of Claims, will necessarily establish whether or not the amounts claimed for mandated services constitute a furtherance of the religious purposes of the claimant . . . . As in the case of *Lemon II*, the single proposed payment for services rendered during the period of the presumed constitutionality of the former Mandated Services Act reflects no more than the school's reliance upon the promise of payment for their continuance to exist as institutions of education and providing a level of education required by the State. Indeed, the majority recognize that in *Lemon II* "a constitutional interest arising from the payments was assumed for the purpose of discussion" and yet would undermine the constitutional sanctioning of a one-time payment where there had been reliance upon a presumably constitutional enactment. The failings of the Mandated Services Act and the enactments of Pennsylvania and Rhode Island, while distinguishable for purposes of understanding what will not be permitted in regard to State enactments which provide aid to religious institutions, have no immediately perceivable impact upon the consideration of whether or not a subsequent payment may be made for reliance where the statutes brought under constitutional attack are not upon their face patently an abridgement of the Constitution. The Legislature recognized a *moral* obligation to reimburse the schools for monies already budgeted and expended. 47 App.Div.2d at 396-97, 366 N.Y.S.2d at 905-06; JS Appendix B, pp. A11-A12 (footnote omitted; emphasis in original).

[9] For the sake of clarity, this decision will be referred to hereinafter as *"Lemon II"*, and this Court's prior decision, *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), holding the underlying Pennsylvania statute unconstitutional on First Amendment grounds, will be referred to as *"Lemon I"*.

He found that, far from "resurrecting" the Mandated Services Act,

> the actual effect of chapter 996 of the Laws of 1972 is to close out the former Mandated Services Act and recognize its unconstitutionality instead of attempting to resurrect the same. In any event, Mandated Services Act . . . and chapter 996 of the Laws of 1972 are readily distinguishable.[10]

Further:

> . . . [I]t is readily apparent that it was never the intent of the Legislature that any of its funds were to be allowed for the furtherance of religious purposes. In this regard, the audit of the claims by the Court of Claims must serve the same purpose as the final post audit which was referred to in *Lemon II* . . . . Accordingly, the burden will be upon the claimant to prove that the items of its claim are in fact solely for mandated services and the burden will be upon the Court of Claims to make appropriate findings in regard thereto. 47 App.Div.2d at 399-400, 366 N.Y.S.2d at 908; JS Appendix B, p. A16.

On July 13, 1976, after the case had been fully briefed and argued, the New York Court of Appeals, by a 4-to-3 majority, rendered the following decision:

> Order reversed, with costs, and the claim reinstated on the dissenting opinion by then Presiding Justice J. Clarence Herlihy at the Appellate Division (47 AD2d 390, 396).[11]

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[10] 47 App.Div.2d at 398, 366 N.Y.S.2d at 907; JS Appendix B, p. A13. The other dissenting opinion concluded as follows:

> The instant case comes directly within *Lemon II*. The interests of fairness and justice dictate upholding a one-time reimbursement for past services authorized by this statute. 47 App.Div.2d at 401-02, 366 N.Y.S.2d at 910.

[11] JS Appendix A. The dissenting judges voted to affirm on the basis of the majority opinion at the Appellate Division.

The State appeals to this Court from this decision.

Jurisdiction

On February 22, 1977, this Court postponed "[f]urther consideration of the question of jurisdiction . . . to the hearing of the case on the merits."

In our Motion to Dismiss or Affirm dated January 12, 1977, we noted that appellant invokes the jurisdiction of this Court under 28 U.S.C. §1257(2), which provides that this Court may review final judgments or decrees rendered by the highest court of a state in which a decision could be had as follows:

> . . . By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

We pointed out that, under *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 476-87 (1975), the judgment appealed from is final for purposes of this Court's review of the question presented. We remain of this opinion, for the reasons stated at pages 10-11 of that motion.

Appellant, while invoking this Court's jurisdiction, argues inconsistently at page 14 of its brief that, in carrying out the decision of the Court of Appeals, the Court of Claims will be required to "segregate" constitutionally reimbursable from non-reimbursable mandated services and that this will result in excessive entanglement between church and state. This is, we submit, incorrect for the reasons set forth below at pages 24-25. We consider that

there can be no excessive (or indeed any) entanglement between church and state in an audit by the Court of Claims of services which were performed approximately five years ago. In addition, neither Chapter 996 nor Presiding Justice Herlihy's opinion require any such "segregation", simply that the claimant prove "that the items of its claim are in fact solely for mandated [as opposed to discretionary] services", to quote from the salient section of the opinion.[12] In pursuing its present "entanglement" argument, appellant necessarily but incorrectly undermines its stated position with regard to the finality, for federal constitutional purposes, of the judgment appealed from.

Summary of Argument

This appeal does not present any substantial federal question. The New York Legislature simply sought to remedy an inequitable situation which arose at the end of the 1971-1972 school year. The correctness and fairness of this type of limited remedial legislative action has been upheld by this Court in *Lemon II*, which involved facts and circumstances substantially similar to those at bar.

Appellant's claim at page 24 of its brief that any direct payment to religiously-affiliated schools "shifts a portion of the cost of running such schools . . . to the State" and is therefore violative of the Establishment Clause has been consistently rejected by this Court and, under the unusual circumstances presented by this case of good faith reliance on a presumptively valid statute, should be rejected for the reasons set forth hereinafter.

[12] *Supra*, p. 10.

Appellant's other claim that the carrying out of the Court of Appeals' decision would involve the Court of Claims "in excessive and unconstitutional entanglement between church and state" [13] cannot withstand analysis. The audit by the Court of Claims would not involve or have any conceivable effect on the current curriculum content or activities of the religiously-affiliated schools and would not involve any state judge or employee in such matters. It would involve simply a judicial inquiry, for purposes of determining the propriety of payment, into the services performed five years ago by the schools in the spring 1972 semester. This fact plus the fact that Chapter 996 provides for a one-time, rather than a continuing, reimbursement compels the conclusion that there cannot be any "excessive" or "continuing surveillance" entanglement between church and state of the type which this Court has heretofore required for invalidation on Establishment Clause grounds.

ARGUMENT

POINT I

CHAPTER 996 IS CONSTITUTIONAL UNDER THIS COURT'S DECISION IN *LEMON II*

The basic question on this appeal is the application of the facts of this case to the constitutional principles enunciated in *Lemon II*. The opinion in the Appellate Division, which formed the basis for the decision of the Court of Appeals upholding Chapter 996, found the facts herein to be substantially similar to those in *Lemon II* and within the flexible equitable principles which this Court set forth

[13] Brief for Appellant, pp. 14-17.

in that case. Since the Court of Appeals correctly applied *Lemon II*, and the decision below does not conflict with other decisions of this Court or other courts, and since the question presented involves only the application of undisputed facts to settled principles of federal law, no substantial federal question is presented.

In *Lemon II*, this Court held that the Establishment Clause does not prohibit a state from paying funds on a limited, one-time basis to nonpublic schools which had relied in good faith upon receipt of such funds pursuant to a state statute which was subsequently held to be unconstitutional, but as to which there had been a reasonable basis for presuming the statute to be valid.

The *Lemon* case arose out of Pennsylvania's enactment in 1968 of the Nonpublic Elementary and Secondary Education Act[14] which authorized reimbursement of nonpublic schools for the salaries of teachers of mathematics, modern foreign languages, physical science and physical education. The nonpublic schools were reimbursed "in four equal installments payable on the first day of September, December, March and June of the school term following the school term in which the secular educational service was rendered". Act 109, §7(a), Pa. Stat. tit. 24, §5607(a). In January 1969, Pennsylvania entered into contracts with nonpublic schools to purchase services for the 1968-1969 school year.

In June 1969, an action was brought, seeking declaratory and permanent injunctive relief against enforcement of Act 109. The plaintiffs filed, but subsequently abandoned, a motion for a preliminary injunction. On November 29,

[14] [1968] Laws of Pa. No. 109, Pa. Stat. tit. 24 §§5601-09 [hereinafter "Act 109"].

1969, a three-judge District Court granted a motion to dismiss the complaint. *Lemon* v. *Kurtzman*, 310 F.Supp. 35 (E.D. Pa. 1969). The plaintiffs appealed to this Court, which ultimately heard oral argument on March 3, 1971. On June 28, 1971, the Court, by a divided vote, declared the statute violative of the Establishment Clause on the ground that the state was constitutionally compelled to assure that the payments were not being used for religious indoctrination and that the ongoing surveillance necessary to accomplish this result created an excessive entanglement between church schools and the state. *Lemon I*, 403 U.S. 602 (1971).

The case was thereupon remanded to the District Court, which in December 1971 entered an order enjoining the defendants "from making payments for services performed or costs incurred *for any period subsequent to June 28, 1971*". *Lemon* v. *Kurtzman*, 348 F.Supp. 300, 301 n.1 (E.D. Pa. 1972) (emphasis added). Because payments for services rendered during the 1970-1971 school year were to be made in September and December of 1971, the effect of the order was to permit the state to reimburse nonpublic schools for the second semester of the 1970-1971 school year in December 1971, a date well after this Court had held the underlying statute to be unconstitutional.

The plaintiffs argued in the District Court that no payments could be made subsequent to the date of this Court's decision in June 1971. The three-judge District Court unanimously rejected this argument, finding no constitutional impediment to reimbursement after the statute had been held unconstitutional for services rendered prior to that determination. The Court stressed the equitable considerations arising from the nonpublic schools' "reliance" on re-

imbursement for the entire 1970-1971 school year by "adjust[ment of] their budgets accordingly and perform[ance of] the services required by them." 348 F.Supp. at 304.

The plaintiffs again appealed to this Court, which in *Lemon II* affirmed the District Court's judgment. The Court rejected, as a principle of constitutional law, the argument that payments subsequent to a declaration of unconstitutionality of an underlying statute are invalid *per se* under the Establishment Clause, but rather viewed the matter as the "process of reconciling the constitutional interests reflected in a new rule of law with reliance interests founded upon the old." 411 U.S. at 198. This process is, the Court explained, equitable in nature:

> In shaping equity decrees, the trial court is vested with broad discretionary power . . . . Moreover, in constitutional adjudication as elsewhere, equitable remedies are a special blend of what is necessary, what is fair, and what is workable. "Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private need." . . .
>
> In equity, as nowhere else, courts eschew rigid absolutes and look to the practical realities and necessities inescapably involved in reconciling competing interests, notwithstanding that those interests have constitutional roots. 411 U.S. at 200, 201 (citations and footnote omitted).

This Court thus enunciated a test of balancing "constitutional" and "reliance" interests in determining whether reimbursement is permissible after a declaration of invalidity for services rendered in good faith prior to that

judicial declaration.[15] As for the constitutional interests, the Court, after noting that "[t]he constitutional fulcrum of *Lemon I* was the excessive entanglement of church and state", observed that the one-time payment of $24,000,000 to nonpublic schools "will not substantially undermine the constitutional interests at stake in *Lemon I*." 411 U.S. at 201. This Court noted problems having constitutional "overtones", but held that they were "minimal" or outweighed by "reliance" considerations. Rejecting the contention that the remaining final audit would engender excessive entanglement, the Court observed:

> . . . [T]here is the question of impinging on the Religion Clauses from the fact of *any* payment that provides any state assistance or aid to sectarian schools—the issue we did not reach in *Lemon I*. Yet even assuming a cognizable constitutional interest in barring any state payments, under the District Court holding that interest is implicated only once under special circumstances that will not recur. There is not present risk of significant intrusive administrative entanglement, since only a final post-audit remains and detailed state surveillance of the schools is a thing of the past. At the same time, that very process of oversight—now an accomplished fact—assures that state funds will not be applied for any sectarian purposes. Finally, as will appear, even this single proposed payment for

[15] Contrary to appellant's argument at Point II of its brief, *Lemon II* does not require that courts apply to a case involving final equitable reimbursement the same three constitutional tests [*e.g.*, *Lemon I*, 403 U.S. at 612-13; *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. 756, 773 (1973)] which are applied in evaluating the validity of original legislation. Rather, *Lemon II* involved a balancing of considerations relating to justifiable reliance by the schools and those relating to the nature and degree of possible injury to Establishment Clause values.

> services long since passing state scrutiny reflects no more than the schools' reliance on promised payment for expenses incurred by them prior to June 28, 1971. 411 U.S. at 202-03 (footnote omitted; emphasis in original).

This Court, in applying the balancing test, then considered the "reliance" interest involved:

> Offsetting the remote possibility of constitutional harm from allowing the State to keep its bargain are the expenses incurred by the schools in reliance on the state statute inviting the contracts made and authorizing reimbursement for past services performed by the schools. 411 U.S. at 203 (footnote omitted).

The Court found there was sufficient evidence in the record of such reliance and emphasized that:

> The significance of appellee schools' reliance is reinforced by the fact that appellants' tactical choice not to press for interim injunctive suspension of payments or contracts during the pendency of the *Lemon I* litigation may well have encouraged the appellee schools to incur detriments in reliance upon reimbursement by the State under Act 109. 411 U.S. at 204.

With respect to the issue of reliance, the plaintiffs argued that the nonpublic schools should not have relied on reimbursement because of the "constitutional cloud" over the statute and because the constitutionality of Act 109 had not been finally adjudicated when the contracts for the 1970-1971 school year were made. This Court held that the unconstitutionality of Act 109 had not been clearly foreshadowed by prior decisions[16] and rejected a rule of law that

[16] *See* 411 U.S. at 206-07 n.7.

> would have state officials stay their hands until newly enacted state programs are "ratified" by the federal courts, or risk draconian, retrospective decrees should the legislation fall. 411 U.S. at 207.

This Court thus held that the equities of reliance by the nonpublic schools on the expectation of reimbursement outweighed the "remote possibility of constitutional harm" and affirmed the judgment of the District Court.

The principle of *Lemon II* has been applied in several recent federal cases involving nonpublic schools. For example, in *Americans United for Separation of Church & State* v. *Paire,* 348 F.Supp. 506 (D.N.H. 1972), a single District Judge held the leasing of parochial school space by a public school district to be unconstitutional in an opinion dated September 13, 1972. The judgment was subsequently vacated on appeal on the ground that it could only be entered by a three-judge District Court. 475 F.2d 462 (1st Cir. 1973). On remand, a three-judge District Court again held the leasing unconstitutional in an opinion dated May 1, 1973, but the Court's order on the same date, citing *Lemon II,* stated that its decision was not "intended to prevent completion of commitments and payment of preexisting grants for the school year 1972-73 or previous years. *Americans United for Separation of Church & State* v. *Paire,* 359 F.Supp. 505, 512 (D.N.H. 1973). Thus, the judgment, although entered well before the end of the school year 1972-73, did not prevent fulfillment of the lease subsequent to the date of judgment. The same prospective application of a three-judge District Court's judgment was ordered in *Americans United for Separation of Church & State* v. *Benton,* 413 F. Supp. 955, 961 (S.D.Iowa 1976).

Cf. Americans United for Separation of Church & State v. *Board of Education*, 369 F.Supp. 1059, 1066 (E.D.Ky. 1974). Indeed, we have not found a case applying *Lemon II* otherwise, and rightly so.

In *Roemer* v. *Board of Public Works of Maryland*, 387 F.Supp. 1282 (D.Md. 1974), the three-judge District Court, while upholding the constitutionality of the Maryland statute as then in effect, pointed out that its

> 1971 version was unconstitutional. As substantial funds were paid out in 1971 to the five schools, this Court must decide whether to order the recipient schools to refund the illegally paid funds to the State of Maryland. 387 F.Supp. at 1291.

The court, relying on *Lemon II*, held that the Establishment Clause values to be protected did not require a refund. *See* 387 F.Supp. at 1291-92. And this Court specifically affirmed the judgment on this point, holding that "the District Court's ruling with respect to the 1971 payments was clearly in keeping with *Lemon II*." *Roemer* v. *Board of Public Works of Maryland*, 426 U.S. 736, 767 n.23 (1976).

Clearly, *Lemon II* controls the question presented by this appeal, and there is no proper basis for any significant distinction between that case and the case at bar. First, the New York courts have found as a fact that appellee relied in its budgeting and other plans for the 1971-1972 school year upon the expectation of reimbursement under the Mandated Services Act for services rendered during the second half of the 1971-1972 school year.[17] In addition, the plaintiffs in *Levitt*, like

[17] *See supra*, p. 7; Appendix, p. 46. *See also* Appendix, pp. 4-6. Indeed, this Court indicated in *Lemon II* that reliance by nonpublic schools in circumstances such as this can be assumed. *See* 411 U.S. at 205 and n.6.

those in *Lemon*, did not move to enjoin preliminarily reimbursement at the commencement of their action, thus postponing any ruling at the District Court level on the merits of the constitutionality of the Mandated Services Act for almost 22 months. That this decision not to move for preliminary relief was motivated by "tactical considerations" as in *Lemon* is not unlikely.

Second, the decision of this Court in *Levitt*, as in *Lemon I*, was not "clearly foreshadowed" by prior decisions. The entire area of permissible or impermissible aid to nonpublic schools, or to the pupils in these schools or their parents, has been the subject of continuous development by this Court. Any claim that the outcome of the Mandated Services Act litigation in the *Levitt* case was clearly foreshadowed either in the District Court or in this Court is, we suggest, incorrect. This is clearly shown by several events relating to that case. A three-judge District Court was convened to decide the constitutionality of the Mandated Services Act, then an appropriate procedure only if a substantial constitutional question—not decided by prior litigation—existed. The District Court's decision was not unanimous; one judge filed a vigorous dissent. 342 F.Supp. at 445-46. On appeal, this Court did not summarily affirm the District Court's judgment, but rather required full briefing and oral argument. Finally, not only was there a dissent, but even the opinion of the Court indicated that a statute providing for reimbursement of required services other than teacher-prepared examinations may be constitutional.[18]

[18] *See* 413 U.S. at 482. Furthermore, Mr. Justice Douglas, Mr. Justice Brennan and Mr. Justice Marshall were of the view that affirmance was compelled by the decisions of the Court in *Committee for Public Education & Religious Liberty* v. *Nyquist*, *supra* note 15, and *Sloan* v. *Lemon*, 413 U.S. 825 (1973), which were handed down on the very same day as the decision in *Levitt*. *See id.*

Therefore, for purposes of the balancing test set forth in *Lemon II,* there can be no doubt, as held by the Court of Appeals in adopting the opinion of Presiding Justice Herlihy, that appellee did rely on being reimbursed for the costs of rendering the services mandated by the State and that appellee's reliance on the presumptive validity of the Mandated Services Act was justifiable.

In attempting to distinguish this case from *Lemon II,* appellant contends, relying on the majority opinion of the Appellate Division, that the critical difference is that, whereas in *Lemon II* the auditing function found by this Court in *Lemon I* to have been the unconstitutional flaw had been completed prior to the claim for payment, the auditing function has not been completed in the case at bar so that there can be no assurance that any money paid to appellee would be applied only to secular purposes; that, if payment is to be made under Chapter 996 according to the same formula set forth in the Mandated Services Act, this would in effect resurrect that Act; and that, if payment under Chapter 996 is to be made only for actual costs in performing the mandated services, an "entangling" audit process would result, creating constitutional interests which, in the opinion of the majority of the Appellate Division, outweighed the reliance interests of the schools.

This attempted distinction is misplaced and premised on a crabbed interpretation of *Lemon II,* rather than on the flexible equitable principles which formed the basis for that decision. Whether or not the audit function has been completed is insignificant because, as discussed at Point II, there is simply no rational basis for concluding that a judicial audit (presumably in 1978) of services performed in 1972 could constitute a present "entanglement", excessive or otherwise, between the State and the religiously-affiliated schools.

Secondly, Chapter 996 does not "resurrect" the Mandated Services Act. Rather, Chapter 996 is limited to reimbursement of nonpublic schools for the single period of the spring 1972 semester when they relied on being reimbursed (and would have been reimbursed) but for the timing of the District Court's decision. Just as this Court found that reimbursement in *Lemon II* of nonpublic schools would "not substantially undermine the constitutional interests at stake in *Lemon I*",[19] reimbursement in this case would not undermine in any way the constitutional interest at stake in *Levitt.* Under the opinion adopted by the Court of Appeals,

> the postaudit, which in this case is to be performed by the Court of Claims, will necessarily establish whether or not the amounts claimed for mandated services constitute a furtherance of the religious purposes of the claimant. 47 App.Div.2d at 397; 366 N.Y.S.2d at 906; JS Appendix B, p. A11.

Appellant's argument would require that *Lemon II* be inflexibly narrowed to its specific facts. It ignores not only the justifiable reliance by appellee on the validity of the Mandated Services Act and the delay of the plaintiffs in pressing for decision in the District Court with regard to it, but also the flexible, equitable approach which was the heart of this Court's opinion in *Lemon II*[20] and which is best summarized in this Court's own words:

> In equity, as nowhere else, courts eschew rigid absolutes and look to the practical realities and necessities

[19] 411 U.S. at 201.

[20] *See generally* 411 U.S. at 198-201.

> inescapably involved in reconciling competing interests, notwithstanding that those interests have constitutional roots. 411 U.S. at 201.

We respectfully submit that, applying this basic principle of *Lemon II* to this case, affirmance is required.

POINT II

THE CARRYING OUT OF THE COURT OF APPEALS' JUDGMENT WILL NOT RESULT IN ANY ENTANGLEMENT BETWEEN CHURCH AND STATE

Appellant argues at pages 14-17 of its brief that an "audit" of appellee's claim by the Court of Claims would entail "excessive entanglement between church and state." This rigid position ignores the fact that *Lemon II* represented an effort by this Court, in limited circumstances where reliance and ensuing hardship can be shown in connection with statutes which are not patently unconstitutional, to take a flexible approach whereby hardships can be ameliorated without significant constitutional injury. In addition, this novel argument ignores the fact that neither this Court nor any other court has ever held or even intimated that judicial review of a matter has entangled it with the litigants. The entanglement found to be unconstitutional in *Lemon I* was "[a] comprehensive, discriminating, and continuing state [*administrative-agency*] surveillance",[21] hardly the relationship contemplated between the Court of Claims and claimant under Chapter 996.

More fundamentally, the Court of Claims' audit, under the opinion adopted by the Court of Appeals, will not involve, as in *Lemon I*, "a comprehensive . . . surveillance" of the current (or even past) activities of appellee. Rather, it will involve a limited inquiry into certain activities of appellee in the spring of 1972 in carrying out the administrative and testing services which it was required to perform under state law. How this type of audit could affect in any way the present or future activities of appellee or inject the State into any such present or future activities defies explanation. Certainly, appellant's brief offers no such explanation.

With regard to "entanglement", this Court has repeatedly noted that, in our interdependent society, some degree of interaction or involvement between church and state is inevitable and necessary. For example, in *Walz* v. *Tax Comm'n of the City of New York*, 397 U.S. 664 (1970), this Court stated that

> the questions are whether the involvement is *excessive*, and whether it is a *continuing* one calling for official and *continuing surveillance* leading to an impermissible degree of entanglement. 397 U.S. at 675 (emphasis added).

Certainly, neither question can be answered affirmatively in the case at bar. The involvement of the Court of Claims, limited to events occurring five years ago, would involve nothing more than the normal fact-finding process of any trial court. Obviously, this case does not (and could not possibly) present any problem of "continuing surveillance" by the State of the nonpublic schools. Hence, its "entanglement" argument is spurious.

[21] 403 U.S. at 619.

Secondly, all services reimbursable in this case were performed and paid for by appellee out of its own funds almost five years ago during the winter and spring of 1972.

Finally, the "remote possibility of constitutional harm" discussed in *Lemon II* is even more remote here. To quote from the opinion adopted by the Court of Appeals:

> . . . [T]he burden will be upon the claimant to prove that the items of its claim are in fact solely for mandated services and the burden will be upon the Court of Claims to make appropriate findings in regard thereto. 47 App.Div.2d at 400, 366 N.Y.S.2d at 908; JS Appendix B, p. A16.

In short, this one-time equitable reimbursement cannot, by any stretch of the imagination, constitute a threat to the principles of the Establishment Clause. What is involved is simply limited equitable relief to appellee in an unusual situation in which it finds itself by reason of its good faith reliance on the validity of the Mandated Services Act.

Conclusion

In view of the foregoing, the appeal herein should be dismissed for lack of a substantial federal question or, in the alternative, the judgment appealed from should be affirmed.

Dated: May 20, 1977

Respectfully submitted,

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APPENDIX

Chapter 996 of the 1972 Laws of New York

CLAIMS AGAINST STATE—NONPROFIT SCHOOLS
CHAPTER 996

An Act to confer jurisdiction upon the court of claims to hear, audit and determine the claim or claims of nonprofit schools, other than public schools for expenses incurred in rendering certain mandated services.

Approved and effective June 8, 1972.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Jurisdiction is hereby conferred upon the court of claims to hear, audit and determine the claim or claims of nonprofit schools in the state, other than public schools, against the state for reimbursement of the funds expended by them in rendering services for examination and inspection in connection with administration, grading and the compiling and reporting of the results of tests and examinations, maintenance of records of pupil enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualifications and characteristics and the preparation and submission to the state of various other reports required by law or regulation. The base of said claim or claims is that the State of New York represented to said schools that they would be reimbursed for such expenses incurred after July first, nineteen hundred seventy; that the said State knew that said schools were relying on said representation; that said representation

was an effective cause of said expenses by said schools; and that without any fault on the part of said schools complete reimbursement has not been paid to them, though due and owing. As such, said claim or claims are founded in right and justice, or in law or equity.

§ 2. In hearing, auditing and determining such claim or claims, the court of claims is hereby authorized to consider, inter alia:

(a) That prior to July first, nineteen hundred seventy, said nonprofit schools, rendered services for examination and inspection in connection with administering, grading and the compiling and reporting of the results of tests and examination, maintenance of records of pupil enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualification and characteristics and the preparation and submission to the state of various other reports as provided for or required by law or regulation;

(b) That by a chapter of the laws of nineteen hundred seventy, it was determined and declared as a matter of legislative finding:

"That the state has a primary responsibility to assure that its precious resource, the young people of the state, receive educational opportunity which will prepare them for the challenges of American life in the last decades of the twentieth century.

That the state has the duty and authority to provide the means to assure, through examination and inspection, and through other activities, that all of the young people of the state, regardless of the school in which they are enrolled, are attending upon instruction as

required by the education law and are maintaining levels of achievement which will adequately prepare them, within their capabilities.

That these fundamental objectives are accomplished with respect to public schools in part through the provision by the state of aid to local school districts to meet such costs.

And that nonpublic schools of the state are responsible for the education of more than eight hundred fifty thousand pupils in the state in conformity with the compulsory education law, and it is a matter of state duty and concern that the attendance, examination and other administrative services of the schools which these children attend in fulfillment of the above state purposes are adequately assisted in furtherance of the general welfare and that in enacting this measure the legislature will be reasonable assisting such services."

(c) That in furtherance of said policy, appropriations were made to the education department to enable the department to reimburse such schools for the rendering of such services;

(d) Based on the representation of the State that reimbursement would be made for such services, such schools already in fiscal crisis, by budgetary allocations and other methods made available the necessary personnel to perform such services;

(e) That the federal courts, by various orders enjoined payments to such schools. As a result reimbursement for the full period July first, nineteen hundred seventy-one to June thirtieth, nineteen hundred seventy-two, has not been made to such schools, although all such services were or will be duly performed;

(f) That such schools during such period did incur expenses in providing the mandated services in reliance upon said representation of reimbursement;

(g) That but for this claim or claims complete reimbursement to such schools would not be made and such schools are thus without legal right to recover for said expenses;

(h) That the legislature recognizes a moral obligation to provide a remedy whereby such schools may recover the complete amount of expenses incurred by them prior to June thirtieth, nineteen hundred seventy-two in reliance on the said representation.

§ 3. If the court finds that such claim or claims or any of them were founded in right and justice or in law and equity against the state of New York, and are in right and justice presently payable thereby, the state shall be deemed to have been liable therefor and such claim or claims shall constitute legal and valid claims against the state, and the court may award and render judgments for the claimants as shall be just and equitable, notwithstanding the lapse of time since any such claim or claims or any parts thereof accrued, or the failure to do any act in relation to the presentation of such claims or any of them within the time prescribed by law, but no award shall be made or judgment rendered hereunder against the state unless such claim shall be filed with the court of claims within ninety days from the passage of this act, nor if such claim, as between citizens of the state, would be barred by lapse of time.

§ 4. This act shall take effect immediately.